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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 PETER ALLEN, et al.,

4 Plaintiffs,

5 v.

19 CV 08173 (LAP)  
Telephone Conference

6 NEW YORK STATE DEPARTMENT OF  
7 CORRECTIONS AND COMMUNITY  
8 SUPERVISION, et al.,

9 Defendants.

-----x

10 New York, N.Y.  
11 January 5, 2023  
12 9:00 a.m.

13 Before:

14 HON. LORETTA A. PRESKA,

15 District Judge

16 APPEARANCES

17 LAW OFFICE OF AMY JANE AGNEW PC

18 Attorneys for Plaintiffs

19 BY: AMY JANE AGNEW

20 JOSHUA LEE MORRISON

21 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

22 Attorneys for Defendants

23 BY: MICHAEL JAMES KEANE

24 IAN RAMAGE

25 WHITEMAN OSTERMAN & HANNA LLP

Attorneys for Defendant Dr. Carol Moores

BY: ORIANA L. KILEY

WILLIAM S. NOLAN

GABRIELLA LEVINE

JENNIFER MARIE THOMAS

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(The Court and all parties appearing telephonically)

THE COURT: Good morning, counsel.

COUNSEL: Good morning, your Honor.

THE COURT: Happy New Year.

COUNSEL: Happy New Year, your Honor.

THE COURT: Who is on for plaintiffs?

MS. AGNEW: Good morning, your Honor. AJ Agnew, and  
with me is Mr. Morrison.

MR. MORRISON: Good morning.

THE COURT: Happy New Year.

Who is on for Dr. Moores?

MS. KILEY: Good morning, your Honor. Oriana Kiley.  
I'm joined by Will Nolan, Gabriella Levine, and Jennifer  
Thomas.

THE COURT: Good morning, ladies and gentlemen. Happy  
New Year.

Who else is on, please?

MR. KEANE: From the Attorney General's Office,  
Michael Keane.

THE COURT: Good morning, Mr. Keane. Happy New Year.

MR. KEANE: Thank you. Same to you.

THE COURT: Anybody else?

MR. RAMAGE: Yes, your Honor. Ian Ramage, also from  
the Attorney General's Office. Good morning.

THE COURT: Yes, sir, good morning. Happy New Year.

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1 And, Andrew, good morning, Mr. Reporter.

2 (Pause)

3 THE COURT: Okay, friends. I have your letters, of  
4 course. I thought we were pretty clear, in the transcript of  
5 our argument a couple of weeks ago, that the issue on the table  
6 is moot. I appreciate what Ms. Kiley wrote to the effect that  
7 we discussed irreparable injury, but we all agree that  
8 deprivation of a constitutional right constitutes irreparable  
9 injury.

10 So, the question is: Is there a deprivation? That  
11 is, of course, tied up in the defendants' defense of mootness.  
12 And as the Court pointed out at page 21 of the transcript, to  
13 prevail on a defense of mootness, there are three issues that  
14 have to be addressed. So, that's what I foresee in our  
15 February 6th hearing.

16 Is there any question about that?

17 MS. KILEY: Yes, your Honor. This is Oriana Kiley.

18 Respectfully, what's still not clear to me is that if  
19 the Court is still unsure if whether or not plaintiffs have  
20 established a deprivation, then it would follow that they  
21 haven't made a prima facie case of irreparable harm.  
22 Therefore, at the hearing, we would assume that they would have  
23 the burden to establish that burden, and then it would turn to  
24 us to put on evidence in opposition surrounding the issue of  
25 mootness.

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1           That's where I'm not clear because the Court did not  
2 expressly state that plaintiffs have met their burden.

3           THE COURT: Ms. Agnew?

4           MS. AGNEW: Your Honor, I do believe in my letter, I  
5 supplied the case law, which I believe your transcript tracked  
6 impeccably – not to suck up to the Court first thing in the  
7 morning – but I believe that the entire hearing is about the  
8 voluntary cessation doctrine, and it's certainly defendants'  
9 burden to prove the prongs of the doctrine; therefore, they  
10 start the hearing.

11          THE COURT: Ms. Kiley?

12          MS. KILEY: Yes, your Honor.

13          All of the cases cited by Ms. Agnew certainly discuss  
14 the prongs of voluntary cessation, and we appreciate that.  
15 Only one of the cases actually refer to a hearing that was  
16 conducted on mootness; however, that hearing in the Nike case  
17 was as to subject matter jurisdiction and not with respect to  
18 the preliminary injunction. None of these cases talk about  
19 whose burden it would be at a hearing. Again, respectfully, we  
20 think that if the Court has not made it clear that plaintiffs  
21 have established their initial burden, that they be the first  
22 to go on to present their case to establish their burden, and  
23 then it would turn to us to present evidence on cessation.

24          THE COURT: Ms. Agnew, what do you say about  
25 irreparable injury?

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1 MS. AGNEW: Well, your Honor, we did brief that. Like  
2 I said, I think that the law is conclusive when there are  
3 constitutional violations, and we certainly put forth evidence  
4 that those were ongoing, including the treatment of Aaron  
5 Dockery, which defendants' counsel very ably handled and got  
6 him treated again, but these are happening repeatedly in these  
7 prisons, and that's what the case is about, and I think that  
8 our evidence on the papers, which I understand will be mingled  
9 with the evidence presented at the hearing or for the Court's  
10 consideration, we've met that burden already. We're going to  
11 meet it again when we rebut the defendants' case, but they have  
12 the burden walking into this hearing, your Honor.

13 THE COURT: Anything else, Ms. Kiley?

14 MS. KILEY: Your Honor, the Court -- the last time we  
15 were on the call, two week ago, the Court denied our 12(b)(1)  
16 already, and that is where we argued mootness. We did not  
17 argue mootness with respect to irreparable harm.

18 THE COURT: I don't know what that means.

19 The point is that defendant, as a defense, argued  
20 mootness, but in so doing, they didn't address the three prongs  
21 of the mootness test. That's why we are undertaking this  
22 hearing. And as I pointed out in the transcript, the question  
23 will be whether the conduct complained of has, in fact, ceased,  
24 whether there is a reasonable expectation that the violations  
25 will recur, and whether policy 1.24A completely and irrevocably

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1 eradicated the effect of the MWAP policy. Those are the issues  
2 at stake in the hearing. That's the question of fact that has  
3 to be addressed.

4 That being said, that means that defendants go first  
5 in demonstrating mootness by demonstrating those three points.  
6 Plaintiffs go next in rebutting those three points.

7 With respect to the papers, certainly, plaintiffs have  
8 established irreparable injury in that they say that the  
9 violations are ongoing; you say, no, they're not, mootness,  
10 and, therefore, you have the burden. So that's the way we'll  
11 go.

12 To the extent that there is argument about how soon  
13 the witness list has to be disclosed – now, I'm not sure that  
14 disclosure is necessary, but, of course, it makes a lot of  
15 sense in terms of efficiency – I take plaintiffs' point that if  
16 they designate three people to testify, and then defendants  
17 resume the medications for those three people, then we're going  
18 to be back in this slop again. So, I'm not sure why it is  
19 insufficient to have the designations on January 18th.

20 Ms. Kiley?

21 MS. KILEY: Yes, your Honor.

22 As we know, this case has been going on for  
23 three years. There are over a hundreds of thousands of pages  
24 of documents to go through and to be prepared for to present to  
25 the Court. As I mentioned in my letter, plaintiffs'

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1 disclosures include over 600 individuals that they may select  
2 to present at the hearing. We just don't think that two weeks  
3 and change is enough time to prepare for this type of hearing.

4 We'd note that since the middle of November,  
5 plaintiffs have mentioned that they are preparing for  
6 evidentiary hearings. We would ask the Court to afford us the  
7 same opportunity to prepare for our opposition.

8 THE COURT: Okay. Let me just ask this: I suspect  
9 that plaintiffs do not intend to call 600 witnesses.

10 Ms. Agnew, what is the approximate number of witnesses  
11 you intend to call?

12 MS. AGNEW: So, your Honor, at this juncture, we have  
13 identified patients who have never been individually assessed  
14 or treated. We believe that that will be the body of our  
15 rebuttal evidence. As you mentioned, we're in an unenviable  
16 position, and I will just give an example. Last night, we got  
17 a letter from Ronald Diggs, who's one of the patients who is  
18 highlighted in our papers. Mr. Diggs, after Defendant Moores,  
19 went to Shawangunk, was sent out to pain management again. He  
20 just got back. The pain management doctor has recommended the  
21 Lyrica, which we have been asking for for two years now. It's  
22 to be seen whether or not DOCCS gets back together and  
23 prescribes the Lyrica. If he's prescribed the Lyrica in the  
24 next two weeks, I would argue that he's not a great patient for  
25 us. I don't think that that means defendants prevail on this

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1 upcoming hearing, because we have other patients. So, where  
2 we're going --

3 THE COURT: Ms. Agnew, may I ask you --

4 MS. AGNEW: Of course.

5 THE COURT: -- I didn't understand the word you said,  
6 I would argue that he is -- oh, is not a great patient; is that  
7 what you said?

8 MS. AGNEW: Yes, yes. I apologize, your Honor. Yes,  
9 because he's going to get on the stand and say, great, I got my  
10 medication a week ago, right?

11 THE COURT: Right.

12 MS. AGNEW: And I think that's wonderful for  
13 Mr. Diggs, and that's what I wanted, and that's why I've been  
14 fighting this case. But we do have a number of patients who we  
15 know are not going to get that over the next two weeks, three  
16 weeks. So, in fairness to defendants, what we want to do is  
17 sit down on January 18th, and we're going to give them a list  
18 of ten. Then, at the hearing, because we need to block out --  
19 there are video rooms, as your Honor is aware -- they're used  
20 for probation hearings and all sorts of things -- we're going to  
21 block out the video, and then we're going to have to make some  
22 discrete choices in the days right before the hearing about who  
23 we actually call.

24 And we're not trying to be --

25 THE COURT: Let me interrupt you.



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1           So, you're saying that on January 18, you're going to  
2 designate ten people, some of whom you will actually call?

3           MS. AGNEW: That's correct.

4           THE COURT: Okay. Why is that insufficient,  
5 Ms. Kiley?

6           MR. NOLAN: Your Honor, this is Will Nolan, for  
7 Dr. Moores. If it's okay, I wanted to answer that question.

8           I think this sort of highlights, the point about  
9 Mr. Diggs sort of highlights, what we're dealing with. We're  
10 looking at this, and we're trying to sort of take a stab in the  
11 dark at who we're supposed to point out is being sufficiently  
12 treated. And there are thousands and thousands of patients,  
13 and where we're struggling is are we supposed to look at every  
14 single one and say every single one is being treated and is  
15 that our burden, or are we supposed to respond to the evidence  
16 that Ms. Agnew is going to offer upfront? This is why we  
17 thought that the burden of proof was important because we  
18 haven't seen a single patient that's been identified where the  
19 Court has said, yes, he's not your burden, and now we have to  
20 look at mootness. We're trying to ascertain what evidence the  
21 Court is expecting of us. Are we supposed to prove upfront  
22 that these ten patients are being treated adequately, or what  
23 sort of evidence is the Court actually looking for from us,  
24 because, certainly, we can't prove a negative by looking at  
25 every single individual at DOCCS and saying they are being

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1 treated perfectly. That's why we thought that the burden  
2 shifting would be more appropriately put on the plaintiff.

3 But we're happy to work with them. Certainly, if we  
4 can identify ten patients that we can look at and address  
5 upfront at the hearing, we're happy to do that. I think that's  
6 what we're really struggling with here, Judge.

7 THE COURT: In your papers on the motion, you made the  
8 argument that because of the policy 1.24A, all of plaintiffs'  
9 claims were moot. As I mentioned, in so arguing, you didn't  
10 address the three prongs of mootness. But the papers,  
11 including Dr. Moores' declaration, laid out an argument for why  
12 the case was moot. How you prove that the case is moot is up  
13 to you. It's probably not a one-patient or all-patient sort of  
14 presentation, but, in your papers on the motion, you chose to  
15 do it through Dr. Moores' declaration.

16 So, however you want to prove that the conduct  
17 complained of has, in fact, ceased, there's a reasonable  
18 expectation that the violations won't recur, and the policy had  
19 completely and irrevocably eradicated the effect of MWAP,  
20 that's up to you. So I can't tell you how to prove it. I  
21 mean, you took steps in the papers to show it, and plaintiffs  
22 then put in contrary evidence sufficient to raise an issue of  
23 fact on the question of mootness.

24 So, I don't know that it's going to help for you to  
25 show that 600 people have been treated or ten people have been

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1 treated.

2 MR. KEANE: Okay, your Honor, I understand.

3 One thing that I think would be helpful is one of the  
4 things we're going to need to do is coordinate witnesses to  
5 rebut what the plaintiff is saying in rebuttal to our case, in  
6 essence, but if we don't know now who those individuals are – I  
7 mean, we can glean from that, but, certainly, in your Honor's  
8 decision, there's no indication of any specific patients that  
9 we have to respond to or that any specific patients have  
10 suffered or about to suffer any irreparable harm – we would ask  
11 for a period of time within which we would be able to  
12 coordinate those rebuttal witnesses and put them on, not be  
13 expected to do that on February 6th. That's all we're asking.

14 THE COURT: There is not going to be an adjournment.

15 And, again, counsel, I'm not sure -- I haven't seen  
16 the evidence, so I can't say at this point, but I'm not sure  
17 it's going to be sufficient. Let's say Ms. Agnew decides to  
18 put five people on, and they say, I haven't been treated, they  
19 say, when I transferred to X facility, I was told, oh, we don't  
20 prescribe your prescribed medication here, and then  
21 miraculously, the night before the hearing, that person gets  
22 prescribed. I'm not sure that that is sufficient. I don't  
23 know if it is or it isn't, but I'm not sure it is.

24 So, I'm not sure how you plan to rebut it anyway.  
25 Maybe you say as to some of these people, well, they shouldn't

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1 have been getting that anyway, that prescription anyway, but it  
2 might well be that your rebuttal is more of a system-wide  
3 rebuttal, I don't know.

4 MR. KEANE: Your Honor, I guess we're not asking for  
5 an adjournment of the February 6th date – certainly we're going  
6 to present evidence on that date – but we expect that Ms. Agnew  
7 is going to come in with very specific individuals who are  
8 going to say, I'm not getting what I need. And we would like  
9 the opportunity to be able to identify the medical providers  
10 who can say the reason they're not getting this alleged  
11 prescription is because of X, Y, and Z, not because of any  
12 underlying policy, not because of any wrongdoing, but because  
13 in our medical judgment, it's certainly appropriate not to have  
14 this person on this drug at this time.

15 And that's what we want the opportunity to do. We  
16 can't do that unless we know exactly who the individuals are.  
17 We're shooting in the dark here, which, I think, is  
18 fundamentally unfair.

19 THE COURT: You're going to know that on January 18,  
20 counsel. That's what we've already decided today.

21 MR. KEANE: I understand that, your Honor, but to  
22 expect us on January 18th to turn around and get witnesses  
23 either to the Southern District or to appear on February 6th, I  
24 think is fundamentally unfair.

25 THE COURT: Ms. Agnew?

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1 MS. AGNEW: Your Honor, I'm trying here. We are all  
2 big boy and girl litigators. That is how litigation works. I  
3 do this for every evidentiary hearing. I'm a little bit at a  
4 loss as to the desire for handholding. You have all the  
5 papers. I'm going to give you ten people. Read their  
6 documents, issue your subpoenas. This is how it goes.

7 THE COURT: Counsel, I'm not sure why the  
8 identification of the ten witnesses is not sufficient for you  
9 to prepare. Certainly, you have at your disposal the medical  
10 records of those ten people. Probably you've already been  
11 alerted to their issues. I'm not sure why this is  
12 insufficient.

13 MR. KEANE: Well, we don't know who these ten people  
14 are, your Honor. We still don't know.

15 THE COURT: You will know on January 18. The hearing  
16 is not until February 6th.

17 MR. KEANE: My point, your Honor, is simply that if we  
18 subpoena people that are not available, or if they're out or if  
19 they're on leave, we would simply ask for the ability to be  
20 able to produce those witnesses in due course if they're not  
21 available on February 6th. We still don't know who they are  
22 because plaintiff has not identified the ten witnesses that  
23 they claim, and they keep changing. They've changed multiple  
24 times.

25 MS. AGNEW: If your clients would just treat them,

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1 there wouldn't be a list. But I'm going to tell you, I've  
2 produced to you schedules of patients. If you look at those  
3 records, you can tell who's getting treated and who's not.  
4 That is going to boil it down to about 25 people.

5 So, I would spend some time looking at the records,  
6 and you're going to know who I'm going to call.

7 MR. KEANE: Who are those 25 people? Can you identify  
8 those 25 people for us now?

9 THE COURT: Do I have to be present for this?

10 MR. KEANE: Your Honor, I think it's fundamentally  
11 unfair for us to be required to have witnesses available on  
12 February 6th with the hearing on a statewide DOCCS injunction  
13 on how we're prescribing medicine is at issue. This is a major  
14 issue, and for us to be required to guess at who the witnesses  
15 the plaintiffs are going to produce right now, not know then  
16 until January 18th, when Ms. Agnew is ready to meet and confer,  
17 again, we would just ask for some semblance of the ability to  
18 respond to that. Two weeks is not enough time to coordinate a  
19 statewide response to --

20 MS. AGNEW: Your Honor, your Honor, if I may. We'll  
21 do this, your Honor, because I'm a good sport. By close of  
22 business today, I'm going to give them a list of 25 patients.

23 THE COURT: Okay. You're going to narrow it down --

24 MS. AGNEW: And then on January 18th -- we're going to  
25 follow up with our clients, we're going to see who's gotten

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1 treated -- let's all pray it's all 25, that would be great. I  
2 don't think it's going to be, unfortunately. But I'm going to  
3 do this: We're going to give you a listing of 25. You guys  
4 get to work and prepare your case.

5 MR. KEANE: I'd appreciate that. That's sufficient.  
6 That's fine.

7 MS. AGNEW: Good.

8 THE COURT: What else do we have to discuss, friends?

9 MS. AGNEW: Your Honor, just to close the loop on the  
10 video room, what Mr. Morrison and I would like to do is send  
11 some proposed orders to you just to lock in a video room at a  
12 couple of facilities for those dates, and then we will, as soon  
13 as we possibly know whether or not we're going to use it, let  
14 the facility know because we're not trying to burden them, but,  
15 at the same time, we will run into the situation where we have  
16 a hearing, and they say, no, somebody else has an arraignment,  
17 and we do want to be prepared, your Honor.

18 THE COURT: Okay. That's all right with you, right,  
19 Mr. Nolan?

20 Mr. Nolan, that's okay with you, right?

21 MR. KEANE: Yes.

22 THE COURT: Thank you.

23 Send those in as soon as you can, Ms. Agnew.

24 MS. AGNEW: I will.

25 And, your Honor, we do plan on issuing two writs of

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1 habeas corpus ad testificandum for two of the representative  
2 plaintiffs.

3 THE COURT: To bring them in or what?

4 MS. AGNEW: Yes, yes. So we'd like to bring in and  
5 take notes, defendants' counsel. We're going to bring in Aaron  
6 Dockery and Mark Daniels, if that's okay with the Court, and  
7 both of them can endure the trip, and, in fact, Mr. Dockery is  
8 set to be released -- may be released by the time of the  
9 hearing, in which case the writ will not be necessary, but we  
10 do want to have the representative plaintiffs there for a  
11 number of reasons.

12 THE COURT: Okay. Go ahead and get that paperwork  
13 together. Back in the day -- and counsel for the defense, you  
14 will remind me -- it was Barbara Lenox -- that's not her name,  
15 but you know who I mean -- who would have coordinated the travel  
16 and the arrangements here in the city.

17 Do you remember who I mean?

18 MR. KEANE: Yes, your Honor. That's Barbara Maddox.

19 THE COURT: Thank you, Mr. Keane.

20 I don't know who the analogous person is now, but  
21 let's get it organized so that we don't have any glitches.

22 MR. KEANE: We will look into that, your Honor.

23 THE COURT: Thanks so much.

24 Who is the new Barbara Maddox, please?

25 MR. KEANE: There really isn't a new Barbara Maddox.



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1 It falls upon all of us. We have a deputy bureau chief, Brenda  
2 Cooke, who comes to us from various positions in the city. So,  
3 she would ultimately be responsible, but Mr. Ramage, Central  
4 CI, and others can figure this out.

5 THE COURT: Okay. Thanks very much. I still miss  
6 Ms. Maddox.

7 Anything else today, friends?

8 MS. AGNEW: Not from plaintiffs, your Honor.

9 MS. KILEY: Your Honor, this is Oriana Kiley.

10 One last issue: Since we've now come to an agreement  
11 about exchange of witness lists, we would ask that the Court  
12 impose a date by which counsel need to exchange exhibits.

13 MS. AGNEW: It's not happening, your Honor. I'm  
14 sorry, that's not happening. They have all their medical  
15 records. That's not how an evidentiary hearing works. You're  
16 going to know who the 25 people are. Pull their records. I  
17 mean, I'm not their paralegal, your Honor. Forgive me, I'm  
18 getting a little frustrated.

19 THE COURT: Ms. Kiley?

20 MS. KILEY: So, do we take this to mean the only  
21 records that are going to be exchanged in this hearing are  
22 strictly medical records and nothing outside of medical  
23 records, such as disciplinary records or anything else?

24 THE COURT: Ms. Agnew?

25 MS. AGNEW: Your Honor, this is an evidentiary

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1 hearing. They have the burden. They're putting on a case. I  
2 am rebutting the case and will use those exhibits that I think  
3 are necessary to meet my case. Whatever I choose to use,  
4 they'll have a copy at the hearing, as in any other evidentiary  
5 hearing. We're very good about that.

6 THE COURT: All right.

7 One more thing, friends: Why don't you make an  
8 appointment with the audiovisual people in the courthouse to  
9 come in in advance, and to be sure all of the technology is  
10 working, particularly the videos to the facility, but also  
11 whatever you need to present your documents. So, just make an  
12 appointment with them. We will let them know that you will be  
13 calling them.

14 Anything else today, friends?

15 MS. KILEY: Not for Dr. Moores.

16 MS. AGNEW: No. Thank you for your time, your Honor.

17 THE COURT: All right, friends. Thank you. Happy New  
18 Year.

19 (Pause)

20 THE COURT: Good morning. Happy New Year, everyone.

21 COUNSEL: Thank you.

22 \* \* \*